

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission)	
On Its Own Motion)	
-vs-)	
United States Steel Corporation)	
)	Docket No. 10-0635
Determination under Section 5 of the Illinois)	
Gas Pipeline Safety Act of the plan USS)	
is to have in place for the inspection and)	
maintenance of its pipeline facilities in)	
and near its Granite City Works.)	

**REVISED REPLY TO BRIEFS ON EXCEPTIONS OF THE
STAFF OF THE ILLINOIS COMMERCE COMMISSION**

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The Staff of the Illinois Commerce Commission (the "Staff"), by and through its counsel, and pursuant to Section 200.830 of the Commission's Rules of Practice (83 Ill. Adm. Code 200.830), respectfully submits its Reply to Briefs on Exceptions in the above-captioned matter.

On November 4, 2010, the Commission entered its Order initiating this proceeding. See, *generally*, Initiating Order. This Order was entered based on an October 2010 Staff Report requesting the opening of such an investigation; the Report in question was made a part of the record and filed on November 15, 2010. See, *generally*, Staff Report. On December 3, 2010, the United States Steel Corporation ("USS") filed a Special and Limited Appearance for the purpose of contesting jurisdiction. See Special and Limited Appearance. Thereafter, on January 14, 2011, Staff and USS jointly filed, and on January 21, 2011, the Chief Administrative Law Judge (CALJ) entered, a Case Management Order. The parties filed testimony, and on March 22, 2012, an evidentiary hearing was held, see Tr. at 4-96, and the matter continued generally. Tr. at 96.

On June 20, 2012, the Staff and USS filed their respective Initial Briefs, and on August 24 and 31, 2012 respectively, Staff and USS filed their Reply Briefs. On July 22, 2013, the CALJ issued his Proposed Interim Order.

In his Proposed Interim Order, the CALJ found that:

GWC's pipes fall within the statutory definition of "transportation of gas" provided in IGPSA. When there is not a statutory definition provided for a term, the plain and ordinary interpretation of the statutory language should be applied. [fn] The definition of "transmission" provided in Merriam-Webster Dictionary is "the act of transmitting." [fn] To determine what the act entails, the word "transmit" can be defined as, "to send or convey from one person or place to another." [fn]

A “distribution” line, based on testimony of U.S. Steel’s witness, is a system [that] consists of mains and services lines, and serves multiple customers.” [fn] The expert witness states that the natural gas pipes meet “all the definition requirements of a small distribution system,” based on that definition. [fn] This evidence establishes that GWC’s natural gas lines are “distribution” lines. Thus, the natural gas lines at issue here are “transportation” lines, and they should be regulated under IGPSA.

U.S. Steel’s argument that the COG lines are not transmission lines because the “gas that has reached and is in control of the end user” is contradicted by expert witness testimony that states that “the direction or ownership of the gas is irrelevant” when determining if the gas is considered “transmitted”. [fn] U.S. Steel concedes that gas is spread from its pipeline to an end point. Based on the plain and ordinary definition of a “transmission line,” GWC’s COG pipelines are “transportation” lines, and they should be regulated under IGSPA.

Proposed Interim Order at 6.

Two parties, respondent USS and a group styling themselves the Industrial Organizations, took exception to the Proposed Order. The Industrial Organizations raise claims very similar to those of USS: namely, that the Proposed Interim Order overbroadly and improperly construes “transmission of gas” as that term is defined in the IGPSA. *See, generally* IO BOE. Accordingly, Staff will address the USS Brief on Exceptions and, to the extent that the Industrial Organizations raise the same arguments, the Staff realleges and reincorporates the same arguments as if fully realleged.

USS, in essence, seeks to avoid regulation and inspection of its natural gas and coke oven gas distribution lines, despite the fact that they intersect, traverse and run immediately adjacent to several public roads, sidewalks and rights-of-way in Granite City, Illinois.

Regrettably for USS, it produced to Staff an expert opinion – from an expert retained by it, which stated as follows:

A distribution system consists of *mains* and *service lines*, and serves multiple consumers. The piping is often convoluted, traversing along many different streets. (Contrast this to a *transmission line*, which typically transports gas in a relatively straight line from one point to another, although there may be occasional lateral connections.)

The USS natural gas pipeline contains a main or mains. Typically the pipe running along a street is considered to be a *main*. From this perspective the USS natural gas piping system would contain several mains, because the system runs along several different streets. (Nevertheless, whether the USS natural gas piping system contains one main or several mains is not critical to this analysis.)

The USS natural gas piping system contains several *service lines*, each service line transporting gas from a common source of supply (a *main*) to an individual customer. All the customers are owned by USS, but each customer is responsible for the amount of gas it uses. Some of the customers are metered, whereas some of the customers are not metered.

In summary, the USS natural gas system is a *system* of pipelines, not a single pipeline. It is supplied through three separate sources. It contains mains that traverse along many separate streets. It contains several service lines. This system has the characteristics of a small distribution system.

. . .

The USS natural gas piping system meets all the definition requirements of a small distribution system. It contains mains and service lines and supplies gas to multiple customers. It has the characteristics of a typical small distribution system.

Staff Ex. 1.01, App. A, Att. 5 at 8 (emphasis in original).

This opinion – proffered by USS itself – really demonstrates the correctness of the Proposed Interim Order, as will be shown.

A. The Proposed Interim Order's Findings are Not Contrary to State Law

USS argues, in essence, that it is not engaged in the "transportation of gas" as that term is defined in the Illinois Gas Pipeline Safety Act (IGPSA), 220 ILCS 20/2.03, and federal regulations, 49 C.F.R. §192.3. See, *generally*, USS BOE at 6, *et seq.* More specifically, it argues that it is not engaged in the transportation or distribution of gas within the meaning of state statute or federal regulations. *Id.* at 6.

As this argument sounds in statutory construction, it is advisable at this juncture to recite the relevant statute in its entirety.

Section 2.03 of the IGPSA provides that:

"Transportation of gas" means the gathering, transmission, or distribution of gas by pipeline or its storage, within this State and not subject to the jurisdiction of the Federal Energy Regulatory Commission under the Natural Gas Act, except that it includes the transmission of gas through pipeline facilities within this State that transport gas from an interstate gas pipeline to a direct sales customer within this State purchasing gas for its own consumption. "Transportation of gas" also includes the conveyance of gas from a gas main through the primary fuel line to the outside wall of residential premises. If the gas meter is placed within 3 feet of the structure, the utility's responsibility shall end at the outlet side of the meter.

220 ILCS 20/2.03 (emphasis added).

Another section cited by USS is Section 2.02.5, which provides that:

"Primary fuel line" means that portion of the customer-owned piping that connects the outlet of the gas meter to the outside wall of residential premises, excluding any customer-owned branch lines that may be connected thereto.

220 ILCS 20/2.02.5.

USS attempts to conclude for this that Sections 2.02.5 and 2.03 should be read to create an exemption for customer-owned facilities. USS BOE at 7. USS asserts that

the rules of statutory construction, and specifically *inclusio unius est exclusio alterius*, require such a result. Id.

This is simply not the case. Where, as here, the word “include” is used in a statute, it is generally improper to conclude that things not specifically enumerated are thereby excluded from the statute’s application, the maxim of *inclusio unius est exclusio alterius* notwithstanding. Paxson v. Bd. of Educ., Dist. No. 87, 276 Ill.App.3d 912, 920-21; 658 N.E.2d 1309, 1315 (1st Dist 1995). Indeed, “the word ‘including’, in its most commonly understood meaning, to be a term of enlargement, not of limitation.” Paxson at 920; 658 N.E.2d at 1314. Thus USS’s attempt to use statutory construction maxims to create an exclusion where none exists should be rejected.

Second, the exclusion which USS seeks to carve rather obviously applies to “residential premises,” 220 ILCS 20/2.02.5, which the USS facilities are demonstrably not.

Even if one is prepared to accept USS’s construction, it is nonetheless unavailing. As USS’s expert notes:

The USS natural gas piping system contains several *service lines*, each service line transporting gas from a common source of supply (a *main*) to an individual customer. All the customers are owned by USS, but each customer is responsible for the amount of gas it uses. Some of the customers are metered, whereas some of the customers are not metered.

Staff Ex. 1.01, App. A, Att. 5 at 8 (emphasis in original).

Individual customers, with individual meters, clearly exist in the system; further, the system “contains mains that traverse along many separate streets[.]” Id. It is clear that even if one is prepared to exclude everything on the customer side of the meter, as USS urges, one is still left with “many” mains and service lines, “travers[ing] many

separate streets[.]” thereby satisfying the definition of distribution even under USS’s “past the meter” exclusion.

B. The Proposed Interim Order’s Findings are Not Contrary to Federal Regulations

USS next argues that it is not engaged in transmission, gathering or distribution of gas within the meaning of applicable federal regulations, specifically 49 C.F.R. §192.3. USS BOE at 9, *et seq.* These arguments are likewise infirm and should likewise be rejected.

Federal Regulations contained in Part 192 “prescribes minimum safety requirements for pipeline facilities and the transportation of gas[.]” 49 C.F.R. §192.1(a).¹ As USS correctly notes the regulations define a distribution line is defined as “a pipeline other than a gathering or transmission line.” USS BOE at 10, *citing* 49 C.F.R. §192.3.

As noted above, USS’s own expert described its system as “contain[ing] a main or mains” and further “contain[ing] several *service lines*[.]” Staff Ex. 1.01, App. A, Att. 5, at 2 (emphasis in original). USS’s facilities, consisting as they do of both “mains” and “service lines” are “distribution lines”, and thus pipelines subject to regulation, within the meaning of the federal rules.

¹ Significantly, 49 C.F.R. §192(b)-(d) identifies a number of types of pipeline to which Part 192 does not apply. The facilities associated with the USS Granite City Works fall within none of these exclusions. The Staff urges consideration of USS’s *inclusio unius est exclusio alterius* argument in this light.

C. The Proposed Interim Order's Findings are Not Contrary to Legislative Intent

USS argues at some length, see USS BOE at 12, *et seq.*, that the Proposed Interim Order does not properly reflect the legislative intent underlying the IGPSA. USS BOE at 12, *et seq.* USS's conclusion is summarized in its last paragraph: that care should be taken not to construe a statute intended to insure the public safety to "give overbroad and undue weight to [the statute's] underlying safety goal." USS BOE at 15. Implicit in this appears to be the assertion that statutes enacted to ensure the public safety should be narrowly construed. USS cites a federal case for this proposition. Id.

The state of the law in Illinois, however, is significantly different. In Illinois state courts, it is well settled that courts must adopt a liberal construction of public safety legislation in order to afford broad protection to those the statute was designed to protect. Kaplan v. Tabb Associates, Inc., 276 Ill.App.3d 320, 323; 657 N.E.2d 1065, 1067 (1st Dist. 1995); Kreke v. Caldwell Construction Co., 105 Ill.App.3d 213, 221; 433 N.E.2d 1337, 1343-44 (4th Dist. 1982); see *also* Halberstadt v. Harris Trust & Savings, 55 Ill.2d 121, 302 N.E.2d 64 (1973) (liberal construction afforded to Structural Work Act as a statute intended to insure safety of workers in dangerous occupations). The concept of liberal statutory construction signifies a statutory interpretation which produces broader coverage or more inclusive application of statutory concepts, and is ordinarily one which results in a statute applying to a greater number of things or in more situations than would be the case under strict construction. Bd. of Educ., Community Consol. Dist. No. 59. v. State Bd. of Educ., 317 Ill.App.3d 790, 795; 740 N.E.2d 428, 433 (1st Dist. 2000). Here, of course, affording a liberal construction to the

IGPSA – undoubtedly a statute enacted to ensure public safety – argues strongly in favor of application to USS, rather than the converse, as USS suggests.

Further, it has been held that a statute governing the transportation of hazardous materials – and it is beyond argument that both natural gas and coke oven case are such materials – should be applied uniformly, again to effectuate legislative purposes of public safety. See Kampen v. Ill. Dept. of Transportation, 150 Ill.App.3d 578, 502 N.E.2d 31 (2nd Dist 1986) (Illinois Hazardous Materials Transportation Act applied to both employee truck driver and employer corporation). Here, of course, applying the IGPSA to small town systems and to the University of Illinois, see Staff Ex. 2.0 at 7, lines 148-155, but not to USS, with its “mains that traverse along many separate streets ... [and] several service lines”, would not be uniform, and would be contrary to legislative intent.

D. The USS-Proffered Expert Opinion is Not an Offer of Settlement, and Any Such Objection Was Waived

As previously noted, the intractable problem that USS confronts in attempting to argue that it is not engaged in the distribution of gas is the fact, duly noted by the Proposed Interim Order, see PIO at 6, that USS’s own expert expressed the opinion that all the natural gas lines are indeed distribution lines, and USS provided Staff with two reports prior to the initiation of this proceeding, which stated precisely that. Staff Ex. 1.01, App. A, Att. 5, at 2.

USS is thus placed in the unenviable position of having to discredit its own expert, which it tries gamely, but unavailingly, to do.

USS argues that the expert opinion relied upon – presented by its own experts – which concluded that the pipelines within the USS Granite City facilities are indeed

distribution lines, somehow constitutes documents produced pursuant to settlement negotiations rather than expert testimony. USS suggests, without explicitly stating, that the expert opinion should thus not have been admitted into evidence. USS BOE at 18-19. USS further asserts that the expert opinion in question is unsworn, and this presumably unreliable. Id. Finally, USS argues that expert testimony is incompetent on a legal issue. Id. at 19. There are several reasons why these assertions are defective and should be rejected.

First, insofar as the admission into evidence of the experts' opinions is objectionable – which, as will be seen, it simply is not – USS waived any such objection. The allegedly objectionable matter was attached to the direct testimony of Staff witness Darin R. Burk. See Staff Ex. 1.01, Att. 5. While USS objected to admission of certain portions of Mr. Burk's direct testimony, see Tr. at 13-17, it did not object to any other portion.² Id. In fact, USS had nearly one year between the filing of Staff's direct testimony on April 1, 2011, see Staff Ex. 1.0, and the evidentiary hearing on March 22, 2012, see Tr. at 1, to bring a motion *in limine* or otherwise object to the expert opinion. USS, however, raised no objection whatever. By failing to do so, it waived any objection it might have to admission of the expert opinion. See, e.g., Krengiel v. Lissner Corp., 250 Ill. App. 3d 288, 294-95; 621 N.E. 2d 91, 96-97 (1st Dist. 1993) (failure to timely raise an evidentiary objection constitutes a waiver of such objection).

Second, there is no evidence whatsoever that anything that could be characterized as an offer of compromise or settlement, as that term is understood within the meaning of Illinois Rule of Evidence 408. An offer of compromise and settlement,

² USS's objection was, in any case, denied after briefing. See Notice of ALJ Ruling dated June 7, 2012.

perhaps obviously, takes place in the context of actual litigation, or at least the contemplation of it. As the federal Circuit Court of Appeals for the Second Circuit observed in Pierce v. F. R. Tripler & Co., 955 F.2d 820 (2nd Dist. 1992):

It is often difficult to determine whether an offer is made “in compromising or attempting to compromise a claim.” [citation] Both the timing of the offer and the existence of a disputed claim are relevant to the determination. [citations and parentheticals] However, where a party is represented by counsel, threatens litigation and has initiated the first administrative steps in that litigation, any offer made between attorneys will be presumed to be an offer within the scope of Rule 408. The party seeking admission of an offer under those circumstances must demonstrate convincingly that the offer was not an attempt to compromise the claim.

Pierce, 955 F.2d at 827 (citations and parentheticals omitted).

Here, of course, no such situation existed at the time the expert opinion was conveyed to Staff. The timing at the very least indicates that the proffer of the opinion by USS was not an offer of settlement. The correspondence conveying the opinion was from a USS corporate Vice President for Operations, and was dated more than one year before this proceeding was initiated. There was no extant litigation. Staff Ex. 1.01, Att. 5 at 2. Accordingly, the assertion that the expert opinion was an offer of compromise is baseless.

USS further asserts that the fact that the opinion is unsworn militates against its reliability. USS BOE at 18-19. This, however, is a futile assertion. The opinion was produced by USS and prepared at the company’s behest. Since oaths are administered so that the swearing party can be prosecuted for perjury if he or she is subsequently shown to have given knowingly false testimony, People v. Audi, 75 Ill.2d 535, 538-39

(1979), the administration of an oath would avail the finder of fact little in this case. The Staff is confident that USS did not proffer false information to Staff.

While expert testimony is incompetent on purely legal issues, and for that matter so is non-expert testimony, this matter is, according to USS, a mixed question of law and fact. It raises numerous factual premises in the proceeding. See USS BOE at 3. The question of whether the USS system has the characteristics of, as the USS expert himself states, a distribution system, is clearly relevant to resolution of the question of jurisdiction.

E. Oral Argument Should Be Denied

USS requests oral argument on the basis that this matter is an issue of first impression and important to USS. USS BOE at 20. This request should be denied. It should be noted that the Proposed Interim Order would, if adopted, result in an *Interim* Commission Order and further proceedings would be convened. At the close of such further proceedings, USS or some other party might have a basis for seeking oral argument. Administrative economy demands that any oral argument be heard at the close of all proceedings, not to argue the whys and wherefores of a Proposed Interim Order.

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety consistent with the arguments set forth herein.

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Respectfully submitted,

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